V.S. 141

Trial against

Karl Ole Stieg,

Wilhelm Laland

&

Fritz Leutzbrog

BK. 420

DUTCH TRIAL REPORTS
AND PROVISIONS

CORRESPONDENCE WITH MISS J.E. SWEENY

~~NETHERLANDS REPRESENTATIVE~~
~~ON THE UNITED NATIONS WAR CRIMES~~
~~COMMISSION~~

~~Room 311, Lansdowne House~~
~~Berkeley Square, London, W.1.~~
~~Telephone: Grosvenor 4060 ext. 324~~
~~Telephone: Victoria 4466 ext. 257~~

Carel van Bijlandtlaan 1,
DEN HAAG.

Ref. XXIIa/156.

2 September 1949.

Dear Dr. Litawski,

I regret it was impossible till now to send you further translations of judgments as I have been very occupied with work for the Ministry of Justice. However here you have three:

a) Special Court of Cassation's judgment on the appeal of August Louis Wilhelm AHLBRECHT;
b) ditto on the appeals in the case of Leonard Gottfried BECK;
c) Special Court at Arnhem's judgment in the case of Oskar Conrad GERBIG.

The original AHLBRECHT case you will remember was that which led to the insertion of art.27a in the Extraordinary Penal Law Decree (D 61) (Dr. Mouton's article in the Grotius Annuaire 1940-1946 reprint, page 54). I sent Mr. Brand a translation of the Special Court at Arnhem's judgment on AHLBRECHT when he again came up for trial last year; a) is the appeal against this.

This office is closing down on the 30th of this month and I shall then no longer be working for the Ministry of Justice. In view of the fact that the staff is being drastically reduced, at least as far as the special branch dealing with war crimes is concerned, would you please let me know whether these translations are wanted by you in connection with anything the United Nations may be intending to publish in the way of jurisprudence. They will need to know this here so that they can decide what to do in the matter after my departure.

With kind regards,
Yours sincerely,

J. Sweeny.

(J. Sweeny,
secretary to Dr. M.W. Mouton.)

Dr. J.J. Litawski,
Consultant on War Crime Trials,
United Nations,
Division of Human Rights,
Russell Square House
Russell Square,
LONDON, W.C.1.

IN THE NAME OF THE QUEEN

The Special Court of Cassation, Second Panel.

On the appeal by AUGUST LOUIS WILHELM AHLBRECHT, born 1 February 1900 in Herberhausen (Ger.), former Sturmscharführer in the Sicherheitsdienst, living in Dusseldorf, now in custody in Scheveningen Prison, appellant against a judgment of the Special Court in Arnhem of 22 September 1948 whereby he was declared guilty of:
"During the time of the present war but before 15 May 1945, in the military, government or public service of the enemy being guilty of any war crime or any crime against humanity as expressed in art.6 under (b) or (c) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Stat. bk. No G 5), committed more than once, which crimes at the same time contain the elements of acts punishable according to Netherlands law", and with the application of arts.57, 287 and 300, Penal Code, was sentenced to DEATH;

Having heard Judge Veegen's report;

Having seen the notification on behalf of the Chief Prosecutor to the appellant of the day fixed for the hearing of the case;

Having heard the appellant as to his person and personal circumstances;

Having heard the Assistant Prosecutor, speaking for the Chief Prosecutor, in his conclusion that the appeal be rejected and the qualification corrected, in the sense that the words "which crimes at the same time contain elements of acts punishable according to Netherlands law" should be omitted;

Considering that in the disputed judgment it has been declared proved against the appellant : that he in the Netherlands, during the time of and in connection with the war of aggression begun by Germany on 10 May 1940 against the Kingdom of the Netherlands and before 15 May 1945, as Sturmscharführer in the Sicherheitspolizei intentionally, contrary to the laws and customs of war and of humanity:

a) in January 1944 in the municipality of Ede intentionally killed JELIS BUDDING, arrested by him, accused, in his above-stated function, in that he intentionally and from a short distance, without there being any reason or grounds for so doing, fired several shots at BUDDING thereby hitting him in the back and thus fatally wounding him, as a result of which BUDDING died shortly after;

c) in the period from May 1942 to May 1945 in Gelderland, in order to compel the persons mentioned below to give information of facts which he, accused, knew or suspected were known to these persons and which were of interest to him in his above function, intentionally ill-treated various persons, among whom were KLEIN-BUSSINK, ~~XXXRTXNXRXXXX~~ W.C. van de GOOR, L.C.J. MASSEUR, MAARTEN ROOS and Th. C. WEETINK, who were arrestees in the power of the German Sicherheitsdienst, violently striking them on the body, partly with a hard object and partly with the hand, and partly kicking them on the body with his shod foot, whereby these persons were caused pain;

Considering that a document containing grounds for cassation

did not reach the office of the Clerk of the Court in time;

Considering ex officio with regard to the qualification:

a) that in this a distinction should be made between war crimes and crimes against humanity, in the sense that the judge should establish which of the two crimes is constituted by that declared to have been proved, or possibly that it constitutes both crimes, so that it is not sufficient to establish that it constitutes the one or the other;

b) that, now that the Special Court, on the grounds of the evidence included in the disputed judgment, has declared proved that there were no grounds or reason for firing at JELIS BUDDINGH, mentioned under (a) in the declaration of proof, and expressly rejects appellant's defence that his victim tried to escape, it should be examined whether this action falls under "murder...of civilian population of or in occupied territory" in the meaning of art.6 under (b) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Stat. bk. No. G 5);

that the term "murder" is given in the official Netherlands translation as "moord", which would cause one to think of the crime of art.289, Penal Code, of which the premeditation of the perpetrator forms an element;

that the word "assassinat" used in the authentic French text of the Charter also appears to point in the direction of a form of homicide qualified by a special intent, as specified in arts. 296-298 of the French Code Pénal and in art.394 of the Belgian Code Pénal;

that however as against this must be remarked that the English Common Law pays homage to a wider conception of "murder";

that it is true an element of this crime is, that the author acted "with malice aforethought", but that in the course of time jurisprudence has come to understand under that word all those forms of a criminal mentality considered sufficiently reprehensible for them to be paid for with life itself (Russel on Crime, 9th edition 1936, page 339 and further; Kenny, Outlines of Criminal Law, 15th edition 1945, page 152 and further);

that the distinction between "murder" and "manslaughter" does not also in any way coincide with that between "moord" and "doodslag" (the respective Dutch words: translator) in the French, Belgian and Netherlands law, and under "manslaughter" death caused through fault is even understood;

that the law of the United States of America is based on the English Common Law and agrees with this to a great extent (Clark and Marshall, Law of Crimes, 3rd edition 1927, page 286 and further; May's Law of Crimes, 4th edition 1938, page 264 and further);

that in that country, however, various degrees of murder are distinguished in the laws of most of the states, and the death penalty only threatened against "murder in the first degree", under which is understood "a wilful, deliberate and premeditated" homicide, or a homicide committed when performing certain serious crimes;

that other punishments than that of death are laid down for all other forms of intentional homicide as "murder in the second degree" (Clark and Marshall, idem, page 304 and further; May, idem, page 268 and further);

that finally, the third authentic text, the Russian, speaks of "oebijstwo", which word is neutral in the sense that every form of intentional killing is indicated by it and it can only acquire colour, in the meaning of indicating murder, by the addition of an adjective such as "oemysljenroje" (premeditated);

that when there is such inconsistency between three equally

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authentic texts that explanation must be accepted which leads to the most reasonable conclusions;

that it would be very unreasonable were an attack on the life of the civilian population of an occupied territory - and equally on that of prisoners of war and people at sea, mentioned in art. 6 (b) of the Charter - only then to be stamped as a war crime if it had taken place with premeditation, while the ill-treatment and deportation of such civilian population and the ill-treatment of prisoners of war and seafarers have in all cases received that qualification;

that therefore as far as the civilian population of an occupied territory is concerned the notion "murder", attention also being paid to the comprehensively put injunction to respect the lives of persons contained in art.46 of the Rules of Landwarfare, must be understood in the broad sense of the Anglo-American ~~legal~~ and Russian juridical usage;

that thus under this heading the appellant was guilty of a war crime in the sense of art.6 (b) of the Charter;

that the ill-treatment of various of the arrestees who found t themselves in the power of the Sicherheitsdienst, which ill-treatment was jointly charged and declared to have been proved, falls under the notion of "ill-treatment ("mauvais traitements") ("istjazanije") of civilian population of or in occupied territory" in the sense of the above-mentioned art.6 under (b);

that however neither the shooting of JELIS BUDDING nor the ill-treatment of arrestees, both declared proved, can be brought under "crimes against humanity" in the sense of art.6 under (c) of the said Charter;

that in its obvious opposition to "war crimes" in the narrow sense, and in the light of the development on the basis of the Charter of the judgments of the International Military Tribunal as well as those of the various Allied courts charged with the trial of war criminals, this notion must be explained in the limited sense that crimes of this category are characterised either by their gravity and barbarity or by their extent, or by the circumstance that they are part of a system of terrorisation or form a link in an unswervingly followed policy directed against certain groups of the population, all this under the proviso made in the Charter itself, that they are committed in the execution of and/or in connection with any ~~crime~~ other crime falling under art. 6 (a) or (b);

that in the present case the Court adheres to the definition given by the United Nations War Crimes Commission in the following words:

"Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which, by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims";

that now that the declaration of proof regarding the shooting and killing of BUDDINGH, and of ill-treatment, constitutes an insufficient ground for establishing that the appellant had thereby been guilty of crimes against humanity in the sense specified above;

that ~~therefore~~ therefore should be altered and limited to war crimes; (the qualification

c) that, finally, there is no place in the qualification for a statement as to whether the elements of crimes punishable according to Netherlands law are or are not present in the crimes declared to have been proved, which point is only of importance for measuring the punishment;

Considering further ex officio:
that the Court - itself moreover entirely agreeing with the Special Court's determination of the acts punishable according to Netherlands Law of which the crimes declared proved contain the elements - is of the opinion that with the comparison instituted by the Special Court should have been associated also the official capacity, as being the circumstance announced in art.44, Penal Code, which increases the penalty, which meanwhile has no influence in determining the limits beneath which the measure of the punishment must in this case remain;

Considering ex officio with regard to the punishment imposed:
that in particular the ill-treatments committed by the appellant show him to be a brutal sort of person, who misused his in fact position of power to torment Netherlanders of the right stamp finding themselves in the hands of the SD, and to give full vent to his cruelty on them;
that on this account then the Court also judges a very severe punishment of the appellant to be fully justified;
that, however, the Court, associating itself with a general tendency which shows itself in the jurisprudence of the international and national military tribunals, considers the criminality of the appellant's acts to be just not so great that he must pay for them with his life, and is therefore of the opinion that a punishment of lifelong imprisonment can suffice;

Quashes the disputed judgment, but only in so far as the qualification and sentence are concerned;

Administering the law afresh, pursuant to art.105 of the Legal Organisation Law:

Qualifies that declared proved as:
"During the time of the present war before 15 May 1945, in the government service of the enemy being guilty of any war crime as expressed in art.6 under (b) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Stat. bk. No G 5), committed more than once;

Sentences the appellant to imprisonment for life.

Judgment passed by:
Prof. Dr, Verzijl — Vice-President
Dr. Veegens)
Dr. Scholten) — Judges
Dr. Mouton)
Col. Dr. Tollenaar — Military Judge
in the presence of:
Dr. Hoorweg — ~~Substitute~~ Deputy Clerk of the Court,

and pronounced at the open session of 11 April 1949.

sgd. J.H.W. Verzijl, D.J. Veegens, Scholten, Mouton, D. Tollenaar, A.F. Hoorweg.

IN THE NAME OF THE QUEEN!.

The Special Court of Cassation, Second Panel.

On the appeals of:

I. the Chief Prosecutor of the Special Court at Arnhem;

II. Leonard Gottfried BECK, born in Feuchtwangen (Bavaria) 7 May 1910, occupation: smith and farmer, living at Neurnberg (Ger.), now detained in the "Centrale Bewaarplaats Scheveningen", the Hague,

appellants in cassation against a judgment of the Special Court at Arnhem of 12 May 1948 whereby the second appellant was declared guilty of the crime of:

"During the time of the present war before 15 May 1945 in the military service of the enemy intentionally allowing that one of his subordinates in the military service of the enemy be guilty of any crime as expressed in art.6 under (b) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Statute book G 5), committed more then once,"

and with the application of arts.27, 57 and 287, Penal Code, and 1, 2, 7, 7b, 11 and 27, Extraordinary Penal Law Decree, was sentenced to three years imprisonment to be wholly served in a State Labour Colony, with the proviso that the time spent by the convicted person in custody since 4 July 1946 up to the day of this judgment being pronounced be deducted when the sentence of imprisonment imposed is being served;

Having heard Judge Tollenaar's report;

Having seen the notification of the day fixed for the hearing of the case sent to the second appellant on behalf of the Chief Prosecutor;

Having heard the second appellant as to his person and personal circumstances;

In view of the mutually presented grounds for cassation reading:

that of the Chief Prosecutor:

Wrong application of the law in the sense of art.16 of the Special Courts Decree by the imposition of a sentence of three years imprisonment, which punishment cannot be considered as answering to the gravity of the crime, the personal circumstances under which it was committed and the person and personal circumstances of the convicted person, a correct appreciation of which would in fact have led to the imposition of a prison sentence of longer duration;

that submitted on behalf of the appellant in counter-appeal, BECK, by his counsel:

Procedure

I. Violation or wrong application of arts.338 and 339, Penal Code, and art.46, Rules of Land Warfare,

a) because in its judgment of 12 May 1948 the Special Court at Arnhem deduced from two of its considerations containing facts of general knowledge, and on the grounds of accused's own attitude at the time of the last fact charged, that appellant pressed for the trial of the persons arrested by a court

of law because he was clearly aware of the fact that the law demanded such a judgment, without however requiring the appellant to make a statement about this at the sitting, which statement would then have shown that the appellant pressed for the setting up of a court, at anyrate of another investigating authority, because he did not consider himself to ~~be in a state~~ (incompetent) to carry out a proper investigation into the matter in question;

F. equal

b) because the Special Court, given the fact that on the grounds of the documents found Lt. Doeven of the Netherlands State Police, the SD Unterscharführer Hardegen and appellant were of the opinion that the arrested persons were dangerous terrorists, did not examine this point further but contented itself with the consideration that a judicial inquiry into the matter would in all probability have established that the executed persons were not terrorists at all but only Jews, and then also without more ado classified these people under the persons "in general" expressed in art.46, Rules of Land Warfare, as a result of which the appellant's attitude with respect to the arrested persons is not clearly set out;

II. Violation or wrong application of arts.40 and 43, Penal Code:

a) because the Court deduces the possibility that the appellant could prevent the execution from the relation of authority between him and the officer who carried out the execution, without paying attention to the same relationship on a rising scale in which the appellant stood with respect to Generals Wolpert and Rauter, in whose name the order to carry out the execution was given to the officer Schwarzen, and whether it was therefore possible for the appellant as a 1st Lieutenant to override by a counter-order an order given in Wolpert's and Rauter's name, the Special Court hereby only going into the consideration that appellant was submitted to severe pressure by Hardegen without its being accepted that this was duress;

b) because the Court paid no attention to the fact that in the first place the appellant applied to the German Police in Apeldoorn to take over the arrested persons, which request could not be complied with on account of duress, consisting in the very difficult ~~position~~ military for the Germans in that place;

military

III. Violation or wrong application of arts.47, 57, 287, Penal Code, and 1, 2, 27a, Extraordinary Penal Law Decree, because the Court, deeming the crime of art.27a, ~~KXXXX~~ Extraordinary Penal Law Decree, to be proved considers that the acts specified therein contain at the same time the elements of punishable acts according to Netherlands law, namely: during the time of the present war before 15 May 1945 intentionally by misuse of authority inciting to homicide, whereby the offender made use of the power offered him by the enemy, committed more than once, the Court overlooking by this that the appellant in no way made use of ~~force~~ Penal in the sense in which this is meant but remained purely passive, as is accepted by the Court itself in its Consideration No. 6, page 5, of the judgment, "that, namely, accused by neglecting to exercise his authority was guilty of a form of incitement to this execution", but there cannot be incitement by misuse of power or authority in a neglect, (Noijen-Langemeijer, 5th edition, page 351);

IV. Wrong application of the law, because the punishment imposed by the judgment cannot be considered to answer to the gravity of the crime and the circumstances under which it was committed and to the person and personal circumstances of the appellant;

and also to a supplementary memorial in support of his

appeal composed by this appellant himself and handed in, which memorial shall be gone into hereunder as far as necessary;

Having heard the Assistant-Prosecutor on behalf of the Chief Prosecutor in his conclusion that this Court shall correct the qualification as further specified in the conclusion, quoting art.44 Penal Code and 21, Extraordinary Penal Law Decree, and for the rest shall reject the appeal;

CONSIDERING that in the disputed judgment it is declared proved against the second appellant:
that he in April 1945 in Gelderland during the time of the war begun on 10 May 1940 by Germany against the Kingdom of the Netherlands but before 15 May 1945, as a Lieutenant of the Nachrichten-Abteilung of the German Wehrmacht and as the superior of Lieutenant A. Schwarze of the Nachrichten-Abteilung of the German Wehrmacht who was his, accused's, subordinate in the above-mentioned branch, intentionally allowed that the said subordinate intentionally killed B. van Esso and L. Gast, defenceless arrestees in the power of the German enemy, by intentionally shooting them dead with a ball-loaded firearm, which as he, accused, knew was contrary to the laws and customs of war, which killing in fact took place without the aforesaid persons having previously been tried in the matter, found guilty by any judicial pronouncement and been sentenced to death;

CONSIDERING that it is desirable for a correct handling of the grounds for cassation set down in the various cassation documents to precede the handling of the Chief Prosecutor's ground and the fourth ground submitted in appellant Beck's name which corresponds to it, by dealing with the first three grounds submitted through his counsel by the latter, and when dealing with these to insert a discussion in the appropriate place of that which appellant Beck has personally ~~put forward~~ advanced as supplementing his appeal;

CONSIDERING with regard to the first ground presented by his counsel in appellant in counter-appeal Beck's name:
that what has been placed under a) amounts to the thesis that the Special Court from the evidence used cannot have deduced that this appellant was conscious of the fact that that with which he is charged was contrary to the laws and customs of war, therefore the judgment would not satisfy that which is laid down in arts.338 and 339 of the Penal Procedure Code;
that it is advanced in support of this thesis that in the disputed judgment the Special Court wrongly interpreted the statement by appellant Beck, as the accused, at the trial, that he urged both Major-General Wolpert and the SD Untersturmführer Hardegen, brought into the matter by the former, that a court should be set up to try the so-called terrorists who had been arrested, the Special Court deducing appellant's knowledge that his behaviour was in conflict with the laws of war from this, instead of explaining it as it was said to have been meant, that is as a remark made by somebody who did not consider himself equal to investigate the affair properly;

CONSIDERING now for a correct understanding of this ground, that in the first place the Special Court deduced appellant Beck's knowledge that the laws and customs of war forbid the execution of a prisoner without a previous trial and a death sentence in regular form from two facts of general knowledge,

these being:
1. that it is contrary to the rules of international law to execute persons for an alleged punishable act without any sort of judicial proceedings, which principle, as appears from all civilised legislation, belongs to the elementary foundations of law and holds good even for the punishment of spies;
2. that anybody in the function at that time of the accused, namely that of Lieutenant of the Nachrichten-Abteilung of the German Wehrmacht, at the same time Orts-Kommandant of Nunspeet, must necessarily - except in very special circumstances which did not appear in this case at the sitting of the Special Court - have been aware of this rule if a case in which the question came up was laid before him in his said function;

that on the ground of these facts of general knowledge the Special Court could already accept appellant's knowledge that his actions conflicted with the laws of war;

that in reinforcement of these considerations the Special Court further advanced ~~that~~ appellant Beck's own attitude after the arrest of the three in Nunspeet as this appeared at the trial, in particular his continuous urging that a court be set up and his lengthy opposition to the execution on the ground that no court judgment had been shown him - an attitude from which, according to the Special Court, it clearly appeared that at the time of the behaviour charged he was thoroughly aware that the law demanded such a judgment, ~~t~~his in opposition to the case of the German soldier Strehlau quoted by appellant, who was acquitted by a judgment of the Special Court at Arnhem dated 15 November 1948 (- see note on last page -);

that all that advanced in the first ground under a) against the Special Court's argumentation is of a factual nature and cannot therefore lead to cassation;

CONSIDERING that section b) of the same ground is equally without foundation;

that the question as to whether the arrested persons were indeed "terrorists" was by rights of no importance seeing that also had this been the case, for the execution of the persons concerned a death sentence passed in the regular way would have been demanded by international law, and the Special Court's consideration that a judicial investigation into the matter would in all probability have established that the executed persons were not terrorists at all but only Jews, obviously only had as its object the underlining in this particular case of that general principle of law to which the first fact of general knowledge related;

CONSIDERING further with regard to the second ground put forward by his counsel on behalf of the appellant in counter-appeal Beck:

that also this is unfounded as far as section a) is concerned;

that the Special Court quite rightly deduced the possibility for appellant Beck to restrain Lieutenant Schwarze, who finally carried out the execution with his own hand, from the very fact, not disputed, of the relation of authority in which he stood to Schwarze, his subordinate, in the Nachrichten-Abteilung, while nothing showed that had he in fact asserted his authority his subordinate would not have recoiled from his act;

that this Court endorses absolutely the Special Court's considerations in this connection, that it has nothing to do with the matter whether, had appellant Beck forbidden Lieutenant Schwarze to proceed with the execution, others would have

perhaps carried it out, since each one has to bear his own responsibility;

that for the rest the question to what extent the order for the execution given by Hardegen - allegedly in Wolpert's or Rauter's name - can extend to the relief of the officers concerned, lies in the domain of duress;

that as far as appellant Beck is concerned an express or implied appeal to duress was not made in front of the Special Court;

that the only thing submitted by him in that direction was that Hardegen had threatened him and Schwarze with the results arising from the "Führer-Befehl" of July 1944 for infringers of that order, namely shooting of themselves and reprisals against their families;

that in another connection however the Special Court had already considered that the said order did not cover appellant Beck's behaviour and therefore could satisfy itself, provided it deemed grounds for this present, with raising the question of Hardegen's threats when giving the grounds for the punishment measured out, which it in fact did;

that what appellant Beck has further advanced in his personally written supplementary cassation memorial in the matter of duress does not contain anything new, and that in particular his assertion that the state of distress in which the German front found itself at the time of the crime urgently demanded the execution of prisoners cannot extend to excusing the commission of a war crime;

CONSIDERING with regard to section b) of appellant Beck's second ground:

that, accepting it that the appellant requested the German police to take over the arrested persons, in any case duress with regard to the non-prohibition of the execution could in no way lie in the circumstance that as a result of the military situation they were not fetched away;

that therefore this section of the second ground also fails;

CONSIDERING with regard to the third ground and ex officio:

that what has been declared proved forms a war crime in the sense of art.6 under (b) of the Charter of the London Agreement of 8 August 1945, this as falling under "murder...of civilian population in occupied territory";

that what is advanced by appellant Beck in his supplementary cassation memorial for the purpose of disputing this thesis partially rests on a purely factual ground and is contrary to that established by the Special Court, and partially harks back to the plea of duress rejected above, and for the rest vainly tries to attack the qualification of that declared proved as the war crime of "murder of civilian population" with the irrelevant reference to "rein militärische Notwendigkeit" and "das allgemeine Interresse der deutschen Truppen und der deutschen Kriegsführung" in connection with the proclamation of the "Standgerichtsbarkeit";

that the law of war is codified with the precise object of balancing the claims of warfare with those of the laws of humanity;

CONSIDERING that as a new argument for contesting the admissibility of sentencing him in the matter of a war crime appellant Beck now appeals to the "Universal Declaration of Human Rights" made by the General Assembly of the United Nations in Paris;

that the purport of this argument is to make acceptable

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that the retroactive effect which the Netherlands legislator granted factually to art.27a, Extraordinary Penal Law Decree would have been condemned later by the said "Universal Declaration" (art.11, par.2);

CONSIDERING with regard to this, that in its contents and working art.27a, Extraordinary Penal Law Decree, is in complete agreement with that laid down in art.6 (b) and (c) of the Charter belonging to the London Agreement of 8 August 1945 and is thus in harmony with rules of law established by international convention, so that under that head there is no cause to put aside the application of the said art.27a on the ground of its being contrary to international law;

that appellant Beck's argument can therefore alone have this juridical meaning, that the London Charter itself must also be judged to have been superseded a short while ago by a new international convention, or must even be considered in retrospect as from the beginning not having been binding as contrary to a compulsory general principle of international law;

that this argument must however be rejected in both its possible variants because from the history of the bringing into existence of the "Universal Declaration of Human Rights" it convincingly appears that this latter is not intended as a binding ~~treaty, and~~ convention, and that it is even very doubtful whether its contents can be noted as a formulation of general principles of law recognised by civilised nations in the sense of art.38, par.1 under 3, of the Statute of the International Court of Justice (cf. Lauterpacht, Preliminary Report, published in United Nations Document E/CR 4/89, page 31), and further because, especially as a result of a Cuban amendment, it was generally recognised in the Paris assembly that in no single respect does the Declaration attack the lawfulness of the trial of war criminals as a result of the London Charter;

that in fact the same United Nations General Assembly which in 1948 accepted the "Universal Declaration" had already in 1946 expressly confirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and that Tribunal's Judgment, and had charged the Commission for the Codification of International Law, "as a matter of primary importance", to formulate those principles within the framework of a general codification of crimes against the peace and safety of humanity, or in that of an international penal code;

that for that reason also the "Universal Declaration of Human Rights" invoked by appellant ~~xxxx~~ in counter-appeal Beck has not in any single respect affected the lawfulness under international law of his trial as a war criminal;

CONSIDERING however further, ex officio, that the qualification as given by the Special Court cannot be maintained and must be corrected as will be stated hereunder;

that too the comparison made by the Special Court between the war crime declared proved and possible analogous punishable acts according to Netherlands law does not appear correct to this Court and insofar must appellant Beck's third ground be considered founded;

that however this cannot lead to the quashing of the judgment but only to its correction;

that paragraph 3 of article 27a, Extraordinary Penal Law

Decree, the intentional allowing by a superior that one of his subordinates is guilty of a war crime, making it an independant crime outside the usual form of participation, refers nevertheless to the provisions of the first, respectively second paragraph of that article for the decision as to what is the maximum limit of the punishment allowed for this crime;

that therefore he who intentionally allows his subordinate to commit a war crime or a crime against humanity can be punished with at the most the same punishment ~~the same punishment~~ as that with which the said subordinate is threatened as the material author, this on the ground of either par.1 or of par.2 of art.27a, Extraordinary Penal Law Decree;

that thus for a comparison as prescribed in art.27a, Extraordinary Penal Law Decree, of the elements of the war crime declared proved with those of crimes according to Netherlands law, in the event of applying the third paragraph of that article the war crime committed by the subordinate as material author alone comes into consideration and not that war crime of the superior which consists in a certain form of participation in that crime;

that therefore as far as the maximum limit of his penal liability is concerned the superior has to follow the subordinate whose crime he has permitted;

that in connection with the above the maximum limit of the punishment to be imposed on the appellant in counter-appeal Beck is decided by the maximum penalty laid on the war crime committed by his subordinate Schwarze, containing the elements of the crime of murder, committed during the present war before 15 May 1945, whereby the perpetrator made use of the power, opportunity and means offered him by the enemy, committed twice under the circumstances increasing the punishment as stated in art.44, Penal Code, in connection with art.21, Extraordinary Penal Law decree;

that for the rest these corrections have in this case no practical significance for the decision as to the maximum penalty permissible;

that in the above considerations based on art.27a, Extraordinary Penal Law Decree, lies an implied rejection of the appellant's further complaint that he was tried on the grounds of that Decree in place of on the basis of the Military Penal Code, this being according to him contrary to art.46, par.1, of the Prisoner of War Convention of 1929 which prescribes that no other punishments may be imposed on a prisoner of war than could be imposed on a member of the national armed forces for the same offence;

that this Court has already previously decided that the said Convention in the provision quoted has only in view punishable acts committed by a prisoner of war during his captivity;

CONSIDERING next that appellant Beck's appeal to that laid down in art.23h of the Rules of Land Warfare is also unfounded, among other things because, as this Court has also previously decided, the provision only relates to rights and claims under civil law;

CONSIDERING further in connection with appellant Beck's appeal - for the rest obscure - to superior orders;

that according to the appellant's own presentation of the facts his subordinate Schwarze did not receive the order for the unlawful execution - i.e. one not covered by a regular death sentence - from him, appellant, but, ~~via him~~, directly passing him by,

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from the SD official Hardegen, allegedly in the name of either General Wolpert or General Rauter, and that the said subordinate knew that an order received from that side was not binding on him without a further special order from the appellant, from which appellant Beck draws the rather peculiar conclusion that "consequently he did not also by a special order have to forbid the carrying out of the order";

that it is now precisely this which constitutes his penal liability, that witout having himself received an order direct from a superior but knowing that his subordinate had received such an order and was intending to carry it out without having first received the at that time requisite order to that effect from the appellant, the latter allowed his subordinate to proceed with the execution without any intervention on his, appellant's, own part;

that under these circumstances any appeal to superior orders which might favourably affect appellant Beck, fails;

that the greater responsibility of General Wolpert, behind which appellant tries to shelter, also in no way excludes the latter's own responsibility for his attitude with regard to a subordinate;

CONSIDERING finally with respect to the punishment to be measured out, dealt with in the only ground for cassation presented by the Chief Prosecutor of the Special Court and in appellant in counter-appeal Beck's fourth ground;

that this Court, equally with the Special Court, considers it must take into account various extenuating circumstances which existed in the present case, but which in its opinion must not be so strongly taken into account as the Special Court thought it its duty to do;

that even taking into consideration the said extenuating circumstances the sentence of imprisonment imposed must be judged too mild as a requital for appellant's share in the responsibility for the cruel double murder committed on defenceless Netherlanders just shortly before the definite German defeat;

that this Court considers imprisonment for seven years to be a just punishment for this share;

QUASHES the disputed judgment, but only as regards the qualification and the major penalty imposed;

ADMINISTERING THE LAW afresh pursuant to art.105, Judicial Organisation Law:

Qualifies that declared proved as :

"During the time of the present war before 15 May 1945 in the military service of the enemy being guilty of a war crime as expressed in art.6 under (b) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Stat. bk. No. G 5)", committed twice;

SENTENCES the defendant, appellant in counter-appeal Beck, to seven years imprisonment, with the proviso that the time spent by him in custody from 4 July 1946 till the day of this judgment's being pronounced shall be deducted when the sentence is being served;

REJECTS the appeal of appellant in counter-appeal Beck.

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Judgment passed by:

Prof. Dr. Verzijl	Vice-President
Dr. Veegens Dr. Scholten Prof. Dr. Kernkamp	Judges
Col. Dr. Tollenaar	Military Judge

in the presence of:
Dr. Hoorweg — Deputy Clerk of the Court,

and pronounced at the public session of 11 April 1949, Prof. Dr. Kernkamp being unable also to sign this judgment.

sgd.: J.H.W. Verzijl, D.J. Veegens, Scholten, D. Tollenaar, A.F. Hoorweg.

Note, page 4. Extract from the judgment on STREHLAU:

"Considering therefore that even though the shooting considered objectively would be contrary to the laws of war, it would not be possible to accept as proved that the accused acted intentionally in this matter, the less so since it does not appear unacceptable to the Court that accused thought in all good faith that it concerned here the shooting of persons found guilty of certain crimes and sentenced to death".

Provisions referred to in the
Special Court of Cassation's Judgment in the case of
Leonard Gottfried BECK.

SPECIAL COURTS DECREE:

art.16: 1. The Special Court of Cassation quashes the judgments of the Special Courts on the grounds named in art.99, par.1, of the Law on the judicial Organisation and the Competence of the Judicature, it being understood that:
1°. the imposition of a penalty or measure which cannot be considered to answer to the gravity of the crime, the circumstances under which it was committed, or the person or personal circumstances of the convicted person, is placed on a par with a wrong application of the law;
2°. neglect of the forms prescribed on pain of nullity need not form a ground for setting aside a judgment if it must be reasonably accepted that the interests of the accused have not been harmed thereby.

JUDICIAL ORGANISATION LAW (translation used as abbreviation for the above-quoted law):

art.99 par.1: The Supreme Court quashes the proceedings, judgments and sentences:
1°. on account of a failure to observe the forms prescribed on pain of nullity;
2°. on account of a wrong application or violation of the law;
3°. on account of competence being exceeded.

CODE OF PENAL PROCEDURE:

art.338: The proof that the accused committed the act charged can only be accepted by the judge if during the investigation at the trial he has obtained the conviction of this from the contents of legal evidence.

art.339: As legal evidence is alone recognised:
1°. the judge's own observation;
2°. statements by the accused;
3°. statements by a witness;
4°. statements by an expert;
5°. written documents.
Facts or circumstances of general knowledge do not need proof.

PENAL CODE:

art.40: He is not punishable who commits an act to which he is impelled by urgent necessity (duress).

art.43: He is not punishable who commits an act in the execution of an official order given him by the competent authority.
An official order given without competence thereto does not remove the liability to punishment unless it was regarded by the subordinate in all good faith as having been competently given and obeying it came within his province as a subordinate.

art.44: If an official through the commission of a punishable act

(over)

(continuation)

(art.44) violates a special official duty or in the commission of a punishable act makes use of the power, opportunity or means offerd him by his office the punishment may be increased by a third.

N.B. arts.27, Penal Code, and 7, Extraordinary Penal Law Decree, translations of which have not previously been given, deal with the deduction of the time spent in preliminary custody from the total imprisonment and with the type of prison in which the sentence can be served.

~~NETHERLANDS REPRESENTATIVE~~
~~ON THE UNITED NATIONS WAR CRIMES~~
~~COMMISSION~~

~~Room 311, Londonwe House,~~
~~Room 350, Church House,~~
~~Berkeley Square, London, W.1.~~
~~Great Smith Street, London, S.W.1.~~
~~Telephone: Grosvenor 4040 ext. 3064~~
~~Telephone: Victoria 4455 ext. 227~~

Carel van Bijlandtlaan 1,
DEN HAAG.

Ref. XXIIa/159.

16 September 1949.

Dear Dr. Litawski,

Here is the translation of the Court of Cassation's judgment in the GERBSCH case promised you by Dr. Mouton. I hope it arrives in time for inclusion in your report.

Yours sincerely,

J. Sweeny,

secretary to Dr. Mouton.

Dr. J.J. Litawski,
Consultant on War Crime Trials,
United Nations,
Division of Human Rights,
Russell Square House,
Russell Square,
LONDON, W.C.1.

IN THE NAME OF THE QUEEN!

The Special Court of Cassation, First Panel.

On the appeals of:

I. the Public Prosecutor of the Special Court in Amsterdam,

II. Wilhelm Friedrich Walter GERBSCH, born in Schwerin 11 March 1890, fish dealer, living in Schwerin, now in custody in the "Centrale Bewaarplaats Scheveningen", the Hague,

appellants in cassation against a judgment of the Special Court in Amsterdam, First Panel, of 25 May 1948, whereby the second appellant was declared guilty of:
"During the time of the war begun by Germany against the Netherlands on 10 May 1940 but before 15 May 1945, in the state service of the enemy being guilty of crimes against humanity as expressed in art.6 under (c) of the Charter ~~xxxxxx~~ belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946, comprising these crimes, and also the elements of: as an official during the legitimate exercise of his function intentionally inflicting on another severe bodily injury which resulted in death, making use thereby of the power, opportunity or means offered him by the enemy and by the fact of the enemy occupation", committed several times,

and with the application of arts.10,27,28,44,57,302, Penal Code and 7b,8,9,11,12,27,27a, Extraordinary Penal Law Decree, was sentenced to 15 years' imprisonment, with the proviso that the time spent in custody by the convicted person before this sentence is put into execution be fully subtracted when the sentence is being served, and with deprivation of the rights of:
2. serving in the armed forces,
one and other for life;

Having heard Judge Heeris' report;

Having seen the notification sent to the second appellant on behalf of the Chief Prosecutor of the day fixed for the hearing of the case;

Having heard the second appellant as to his person and personal circumstances;

In view of the grounds for cassation presented by the first appellant, for so far as of interest here reading:
I. Violation, at anyrate wrong application of arts.1,4,11, 21 and 27a, Extraordinary Penal Law Decree, and 44,57,102 and 302, Penal Code, since the Special Court has qualified that declared proved as also comprising the elements of "as an official during the legitimate exercise of his function intentionally inflicting on another severe bodily injury which resulted in death, making use thereby of the power, opportunity or means offered him by the enemy or by the fact of the enemy occupation, committed several times", and, paying attention also to arts.44,57 and 302, Penal Code, sentenced GERBSCH on that account;
II. Violation, at anyrate wrong application of arts.338, 339 340,350,351 and 358, Code of Penal Procedure, since the Special Court, on the grounds of its own observation at the

sitting, has established and considers proved that the accused disposes of such a faulty development of his mental faculties - a situation accepted by the Court as having existed at the time of the acts declared proved - that the Court has not wished to inflict the severest penalty, this without any statement by an expert or witness being adduced as proof;
III. Violation, at anyrate wrong application of the articles named under I, since the Court has imposed a punishment which cannot be deemed to answer to the gravity of the crimes declared proved and to the circumstances under which they were committed;

The following is remarked as an explanation:
(see I.) The Special Court has declared that the accused as a guard in the German state service applied a system of severe ill-treatment in a camp, and that he intentionally acted contrary to humanity, having intentionally perpetrated terrorism.
By talkingof "a system" and "perpetrating terrorism" the Court has declared the crime committed to be of another order than that alone of several times committing ill-treatment as expressed in art.302 of the Penal Code. A system signifies that the acts must be seen as an expression of an intention, a plan, and one central, undivided thought; it has a definite object for all actions committed within the framework of that system. That object was: by systematic terrorism to extort from prisoners shut up in a penal camp the utmost effort of work of which they were capable, and at the same time to make the full wrath of the Third Reich felt if a sufficient desire for work was not shown or sufficient aid not given to the German war effort. This makes the "acting contrary to humanity" declared to have been proved equivalent to the persisted in crime of assisting the enemy, so that the Court ought to have applied art.102, Penal Code;

In view of the grounds for cassation presented in the name of the second appellant reading:
I. Violation, at anyrate wrong application of arts.2-8, 56, 57, 302, Penal Code, 338-344,350,351,358 and 359, Code of Penal Procedure, and 1,4 and 27a, Extraordinary Penal Law Decree, since the Court, accepting that a series of persisted in severe ill-treatments constituted in one demonstrable case a principal cause of the death of a fellow-countryman:
a) wrongly declared proved that the accused applied a system of severe ill-treatments of which also persons deported or transferred to Germany were the victims, in that he at that time intentionally, repeatedly and violently struck with a blunt instrument a great number of the persons placed under his supervision so that severe bodily injury followed, as a result of which these persons died;
b) wrongly qualified that declared proved as having been committed several times;
c) wrongly considered that the Special Court possessed legal competence to try this case.
II. Violation, at anyrate wrong application of the articles named under I, since the Court, establishing on the grounds of its own observation the faulty development of accused's mental faculties has, without having been advised by experts as to the extent of this faulty development, imposed a punishment which cannot be deemed to answer to the person or personal circumstances of the convicted person;

Having heard the Chief Prosecutor in his conclusion that

the judgment be quashed and the case sent back to the Special Court in Amsterdam;

CONSIDERING that in the disputed judgment it has been declared proved against the second appellant: that he in Zöschen, on various dates in the years 1944 and 1945, making use of the power, opportunity and means offered him by the enemy and the fact of the enemy occupation of the Netherlands and of other European countries - to wit, employed in the German state service ~~xxxx~~ as a guard over the persons of various nationalities residing in the penal camp at Zöschen, which persons had been deported or transferred to Germany, and by means of a rubber truncheon carried by him in the execution of his duties, intentionally applied a system of ill-treatment in the said camp of which also persons deported or transferred from the Netherlands to Germany and detained in that camp were the victims, in that he at that time intentionally, repeatedly and violently struck a great number of persons placed under his supervision with a blunt instrument so that severe bodily injury followed as a result of which various of these persons died, it being understood that the accused in particular intentionally and repeatedly made a person known to his fellow-prisoners by the name Peters, or Piet the Amsterdammer, push a fully loaded wheelbarrow and when this person could not go on repeatedly and violently struck him with a blunt instrument until he fell down and did not get up again; whereby the accused as an official in the state service of the enemy acted within the limits of the powers allowed him as such, and in connection with the war unleashed by Germany against the Netherlands and other countries acted contrary to humanity, he, the accused, having intentionally perpetrated terrorism against Netherlanders and against persons by the ill-treatment of whom the interest of the Netherlands was or could be harmed;

CONSIDERING with regard to the first ground of the second appellant which appears under c):

that the competence of the Special Court in the present case rests on the Special Courts Decree in connection with arts.1, 4, par.1 sub-division 1, and 27a of the Extraordinary Penal Law Decree so that the only question which remains to be answered is whether in agreement with art.13a of the General Provisions that competence is subject to limitation, which question this appellant answers in the affirmative on the ground that he is not being tried on account of war crimes committed in this country but in his own country, Germany;

CONSIDERING, however, that since the first world war a swift development of international law has taken place in the direction, among others, of the trying of war criminals either by an international court or by courts of the belligerent State which has been prejudiced, which last criterium can be found in the concluding words of art.4, par.1 sub-division 1, of the Extraordinary Penal Law Decree;

that the appeal to art.3 of the London Agreement of 8 August 1945 which/~~xxx~~ made at the sitting also fails since this article only relates to the "major war criminals" to whom the appellant does not belong; / has been

that on the other hand art.6 of the said Agreement expressly leaves open the possibility of the trial of other war criminals by the courts of the contracting powers;

that the appeal to the Declaration of Moscow made at the

sitting in cassation also fails, seeing that a regulation is only given thereby with regard to the trying of war crimes committed in the terrorities occupied at the time by the Germans and not with regard to those which they committed in Germany itself;

CONSIDERING that this sub-division cannot then lead to cassation;

CONSIDERING that however section a) has been rightly pleaded because from the evidence used by the Court it cannot follow that as a result of the severe bodily injury caused them various persons died, whereby this Court (of Cassation) further remarks, that according to the same declaration ~~ixxdf~~ that death has been proved this is precisely what does not appear in the case of the victim Peters, specially named by the Special Court in this connection;

CONSIDERING moreover, ex officio, that it is true that for the admissibility of the Public Prosecutor (Openbaar Ministerie) in a penal prosecution on the ground of art.4, par.1 sub-division 1, it is not necessary for it to be put in the writ that the act was committed against or with regard to Netherlanders or a Netherlands corporation, or that a Netherlands interest has been or can be harmed, but that if, as here, those circumstances have indeed been charged and declared by the Court to have been proved this must then also appear out of the evidence used, which however is not the case here so that on this ground also the judgment cannot stand;

Quashes the disputed judgment;

Administering the law pursuant to art.106 of the Judicial Organisation Law:

Refers the case to the Special Court in the Hague ('s-Gravenhage) in order that it may be tried afresh, attention being paid to the acquittal given.

Judgment passed by:

Dr. Haga		President
Prof. Dr. van Brackel	)	Judges
Dr. Mouton	)	
Vice-Admiral Vos	)	Military Judges
Vice-Admiral Heeris	)	

in the presence of:
Dr. van Oordt — Clerk of the Court,

and pronounced at the public sitting of 9 March 1949.

sgd. Haga, S. van Brackel, M.W. Mouton, A. Vos, F.J. Heeris, H. van OOrdt.

IN THE NAME OF THE QUEEN!

The Special Court at Arnhem has passed the following judgment in the case of the Public Prosecutor against:

Oskar Conrad GERBIG,
born in Elm (Ger.), 6 August 1906;
by occupation, head inspector of customs;
living at Dreibrüderstrasze 18, Schlüttern (Ger.),
now detained in Arnhem Prison,

ACCUSED.

The Special Court;

In view of the investigation at the sitting;

Having heard the demand of the Chief Prosecutor;

Having heard the accused, assisted by Dr. B. Stoppelsteen, advocate, Arnhem;

Considering that it has been charged against the accused that he:

I. on or about 15 February 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940 but before 15 May 1945, in Almelo, at anyrate in the Netherlands, as Hauptsturmführer in the service of or with the enemy, at anyrate in the military, state or public service of or with the enemy, intentionally contrary to the laws and customs of war together with Hardegen, at anyrate alone, ordered F. Holbeck and F. Neubacher, subordinated to him, the accused, at anyrate a person subordinated to him, to shoot an arrestee of the Sicherheitspolizei in Almelo, as a result of which action by Neubacher and/or Holbeck the arrestee in question, R.J. Beverdam, lost his life;

II. on or about 8 March 1945 in Apeldoorn, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940 but before 15 May 1945, as Hauptsturmführer and Kommandoführer of the Einsatzkommando Apeldoorn, in the service of the enemy, at anyrate in the military, state or public service of or with the enemy, knowing that about 150, at anyrate about 100 persons were going to be shot as a so-called reprisal for the attack a short while before on the Höhere SS- und Polizeiführer H.A. Rauter whereby the latter was wounded, intentionally contrary to the laws and customs of war caused a list to be drawn up of prisoners of the Einsatzkommando in Apeldoorn who came into consideration for making part of that number and had this list passed on to Brigadeführer Schöngarth, these persons, at anyrate one or more of them, being shot as a result of the one and the other;

III. on or about 8 March 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940 but before 15 May 1945, at the place called "Woeste Hoeve", at anyrate in the Netherlands, as Hauptsturmführer in the service of the German enemy, at anyrate in the military, state or public service of or with the enemy, intentionally contrary to the laws and

customs of war took measures for the shooting of 117, at anyrate of about 100 Netherlanders which took place as a so-called reprisal against the attack on H.A. Rauter referred to under II, these measures consisting in:
a. having the victims taken on his instructions to the "Woeste Hoeve";
b. giving these victims over to the commandant of the execution squad;
c. dividing the victims up into groups of 20 and telling them that they were going to be shot as a reprisal for an attack on a high-ranking German soldier;
as a result of which way of acting on the accused's part 117, at anyrate a great number of Netherlanders lost their lives near the "Woeste Hoeve" through shooting;

IV. on or about 10 April 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940 but before 15 May 1945, in Apeldoorn, as Hauptsturmführer and Kommandoführer of the Einsatzkommando Apeldoorn of the Sicherheitspolizei, at anyrate in the ~~xxxxx~~ military, state or public service of or with the enemy, intentionally contrary to the laws and customs of war charged his subordinate R.G.T. Ohmstedt to see to the shooting of a number of prisoners, as a result of which action by the said Ohmstedt 12, at anyrate a number of prisoners lost their lives in the "Lager Mia" in Apeldoorn through shooting;
he, the accused, having committed the actions mentioned under I-IV while he knew, at anyrate understood, that the persons to be shot had not been sentenced to death by any judicial pronouncement and that a reprisal measure allowed by international law was not concerned here;

CONSIDERING that the accused has pleaded thet the Court is incompetent to take judicial notice of that charged because he, the accused, has the status of a prisoner of war and therefore on the ground of the Geneva Convention of 1929 only a military board, and that a German board, would be competent to deal with that charged;

CONSIDERING that the Court rejects this plea because, leaving aside as to whether the accused is or is not a prisoner of war and ~~xxxx~~ whether the said convention does contain such a provision, that convention is only applicable to punishable acts committed during captivity;

CONSIDERING that the accused also invokes the incompetency of the Court on the ground that this competency would contravene the sovereignty of the German State and on the ground that the Netherlands judge would then be administering the law in a matter affecting his own interests;

CONSIDERING that the Court rejects this plea also because the competency of the Netherlands judge rests on art. 27a, Extraordinary Penal Law Decree, which contains a delegation to the national legislator of the competency of international justice;

CONSIDERING that the Court does not consider that charged under II and IIIa to be legally and convincingly proved so that therefore the accused must be acquitted of the same;

CONSIDERING with respect to that charged under I that at

the sitting of the court the following have stated in substance:
accused:
On 25 September 1944 I was appointed Kommandoführer of the Einsatzkommando of the SIPO in Almelo; my rank was Hauptsturmführer.
Untersturmführer Hardegen was attached to me as Kriminalsekretär.
On 11 February 1945 I received news that 2 German soldiers were said to have been shot dead in Wierden by the illegal movement, the supposed author being said to have committed suicide while being pursued. Hardegen reported what had happened to the B.d.S. (Befehlshaber der Sicherheitspolizei) and asked for the shooting of 30 hostages as a reprisal. The B.d.S however at once refused the high number of 30 and gave me orders to have 5 arrestees from Wierden municipality shot as a deterrent. Hardegen told me next day that three arrestees had been brought in from Wierden. One of them was released at once seeing that he was an N.S.B. man, the second arrestee was let go shortly after as it turned out he was the father of a large family. About 13 February 1945 I, together with Hardegen, then gave my subordinates Holbeck and Neubacher orders in the Dienststelle in Almelo to shoot the third arrestee whose name was Beverdam.
I remember that on the evening of the same day the said Neubacher reported at the Dienststelle that Beverdam had been shot while attempting to escape.

witness F. Neubacher:
At the end of the war I was with the Einsatzkommando of The SIPO at Almelo; my chief was Kommandoführer Gerbig, Untersturmführer Hardegen was Kriminalsekretär.
During a shooting affray in Wierden at the beginning of February 1945 two German soldiers were shot dead. That same day 2 arrestees were brought into the Dienststelle in Almelo; I think I remember that they were clandestine slaughterers from Wierden. The accused Gerbig gave Holbeck and me orders to shoot these arrestees as hostages. After during an interrogation of the arrestees it turned out that one of the men was the father of 6 children this latter was released by Gerbig's orders. The execution of the other arrestee, whom I found to be called Beverdam, had to be carried out according to the accused. Some hours later Hardegen came to Holbeck and me and again gave orders to shoot the arrestee in question, adding further instructions as to the spot where the execution must take place. That same evening - it is possible that it was 13 February 1945 - Holbeck and I took the arrestee Beverdam with us from the Dienststelle to the Huis van Bewaring (detention prison). When on the way there the arrestee made an attempt to escape we shot him dead. After having made certain that the man was dead we returned to the Dienststelle and reported that the order had been carried out, after which the Netherlands police was warned that the body of a man was lying in the Bornsestraat.

witness F.H. Holbeck:
I was with the Einsatzkommando of the SIPO at Almelo at the end of the war, My chief was Hauptsturmführer Gerbig; Untersturmführer Hardegen was Kriminalsekretär.
In the beginning of February 1945 two arrestees, who proved to be clandestine slaughterers, were brought into the Dienststelle in Almelo. The same day Neubacher and I received orders from our chief, Hauptsturmführer Gerbig, and from Hardegen to shoot both arrestees as hostages for the death of 2 German soldiers. As it proved that one of the arrestees was the father

of a large family the order to execute this person was later withdrawn by Gerbig. As far as the other arrestee, a man who turned out to be called Beverdam, was concerned both Gerbig and Hardegen stuck to it that he must be shot. Gerbig and Hardegen charged us to make it appear as if the arrestee was shot when running away. The same evening - about 13 February 1945 - we carried out this commission. We took the man with us from the Dienststelle in the direction of the Grote Straat. At a given moment Neubacher and I shot him simultaneously in the back of the head with our pistols; he appeared to have been killed immediately.

CONSIDERING that from the extract from the register of deaths of the Wierden municipality appears that on 13 February 1945

Rikus Johannes Beverdam,
son of J.H. Beverdam and J. Wolters,

died in Almelo;

CONSIDERING with regard to that charged under III(b) and (c), that the following stated in substance at the sitting of the Court:

accused:

In March 1945 I was Kommandoführer of the Einsatzkommando of the SIPO in Apeldoorn. I had the rank of Hauptsturmführer. I was informed by my chief, Brigadeführer Schöngarth, that as a reprisal for the attack on Rauter, which had taken place on 6 March, a large number of Netherlanders would be shot on 8 March near, among others, the "Woeste Hoeve". On 7 March I received orders from Kolitz that I was to have the prisoners who would be brought to my Dienststelle from the other Dienststellen, together with those prisoners present in Apeldoorn, transported to the "Woeste Hoeve" and to give them over there to the commandant of the execution squad to be shot. The following morning - 8 March- I got everything ready for the prisoners' departure and then myself went off to the "Woeste Hoeve". The prisoners were taken in motor-busses to near the "Woeste Hoeve", then from the busses were escorted in groups of twenty to the spot where the execution would take place. There the victims were formed up in a long row and I read them out the Reich Commissioner's decree in which it was said that they would be shot dead as a reprisal for the attack on Rauter. After this I gave them over to the commandant of the execution squad who each time gave the squad the order to fire. The firing squad consisted of about 50 soldiers from a "Waffen Schule" belonging to the Ordnungspolizei. The fallen were examined by a doctor to see which of them must have a finishing shot. Not many finishing shots were given. Each time after an execution the place of this was screened off by German soldiers. Each following batch of 20 prisoners was then formed up 50 metres further along the grass verge of the road. I told each batch that they were going to be shot as a reprisal for an attack on a high-ranking German soldier, after which the batch was given over to the commandant of the execution squad. In all 117 prisoners were shot in this way. Witness Slagter acted as interpreter at the reading of the announcement. Hauptsturmführer was at the execution part of the time.

witness M. Slagter:

Early in the morning of 8 March 1945 I received orders to go with Kriminalrat Harders to the "Woeste Hoeve" - the place where there had been an attack on Rauter two days before. Arrived there I saw that at the spot where the attack had taken place

the ground was cordoned off by SD and German police officials. Gerbig informed me that a shooting was to take place there as a reprisal for the attack on Rauter. A number of prisoners were then lined up and a firing squad took up its position in front of them. Gerbig then told these prisoners that they were to be killed as a reprisal for the attack on Rauter. I then received orders to act as interpreter and each time to translate the announcement. Each time that 20 prisoners were lined up Gerbig read out the announcement which I then translated, after which the prisoners were shot dead after an order given by an officer of the Grüne Polizei.

witness H.E. Harders:

From February 1945 I was working as Hauptsturmführer and Kriminalrat with the SIPO in Zwolle. On the morning of 7 March I heard that an attack had been made on Rauter. I received orders from Kolitz to hold an investigation at the spot. I took Bartels and Slagter with me. At midday that same day I had an interview with Schöngarth at Gerbig's house. Schöngarth told me that he had been sent for by the Reich Commissioner in connection with reprisals to be taken. The next morning - 8 March- I went again to the "Woeste Hoeve" and was present at part of the execution. I think about 117-120 persons were shot then.

When the order was given for the repriaal shooting the investigation was in my opinion only in the first stages and there was no question of its being doomed to failure from the beginning, on the contrary there was a reasonable chance of getting hold of the authors.

CONSIDERING with regard to that charged under IV, that the following stated in substance at the sitting:

accused:

In April 1945 I was Hauptsturmführer and Kommandoführer of the Einsatzkommando of the SIPO in Apeldoorn. Kriminalsekretär Ohmstedt was my subordinate.

About 10 April by order of my chief Schöngarth I gave the said Ohmstedt orders in Apeldoorn to shoot 12 prisoners, shut up in the Willem III barracks as so-called "bad cases", on account of "Feindbegunstigung". I had before this talked over with Ohmstedt where the execution must take place. With that object I got into touch with the "Lager Mia" in Apeldoorn in order to ask permission for the shooting to take place in its grounds. I charged Ohmstedt with the carrying out of this particular mission and did not bother myself further with it. It is possible that after it was over Ohmstedt informed me that the order had been carried out.

witness R.G.F. Ohmstedt:

In 1945 I was Kriminalsekretär with the Einsatzkommando of the SIPO in Apeldoorn. On 10 or 12 April I received a verbal order in Apeldoorn from my chief, Hauptsturmführer Gerbig, to shoot 12 arrestees who were in the Willem III barracks. The prisoners were taken in two groups to the "Lager Mia" where the execution took place. Six men were shot each time. About an hour before the execution I told the prisoners in the Willem III barracks that they were to be shot. The execution was carried out swiftly and correctly. The men all had head and heart wounds, two were given finishing shots. Directly after the execution I convinced myself that the men were dead and did this once again before we buried the bodies. After the execution was over I reported at the Dienststelle that the order had been carried out and handed the names of the persons shot to Gerbig.

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CONSIDERING with regard to that charged under I, III and IV that at the sitting the accused stated that at the time of the acts charged he knew that the war of aggression begun by Germany against the Netherlands on 10 May 1940 was still going on;

that he, accused, also knew that the German courts of law had been closed down by Rauter at the end of 1944; that he knew that none of the persons to be shot had been condemned to death by any judicial pronouncement.

In none of the cases were the victims allowed spiritual assistance.

CONSIDERING that it is also a fact of general knowledge that international law, and in particular the Rules of Land Warfare in arts.46 and 50, lays on the occupier the duty of respecting the lives of persons, which most certainly contains a prohibition to shoot people dead, or collaborate therein, without any form of judicial proceedings, and also that, except under special circumstances which have not appeared at the sitting, anyone of accused's education and position who carries out actions such as stated under I, III and IV of the indictment must in substance have been asquainted with this rule of international law;

CONSIDERING that it is equally a fact of general knowledge that - except in special circumstances which have not appeared in the present case at the sitting - anyone of accused's education and position who for a number of months filled a post as Kommandoführer with the SD must necessarily have known that executions such as those stated under I, III and IV, whereby there there was no talk of a proper investigation as to the authors of the alleged sabotage, or where as in the case under I the author was known and was dead, where moreover there was no talk of any proportion to the alleged sabotage and whereby persons were shot who were in no way guilty of the alleged sabotage, which executions, finally, were carried out without the victims being allowed spiritual aid, were contrary to the laws and customs of war and were not permitted as reprisals by international law;

CONSIDERING that the facts and circumstances appearing ~~in~~ in the above evidence and the facts and circumstances of general knowledge named above constitute an equal number of causal facts and circumstances on the grounds of which the Special Court considers proved and has been convinced that the accused committed that with which he is charged under I, III ~~and IV~~ (b) and (c), and IV, it being under-stood that he, on or about 15 February 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940, in Almelo, as Hauptsturmführer in the service of the enemy intentionally contrary to the laws and customs of war together and in conjunction with Hardegen ordered F. Holbeck and F. Neubacher, subordinated to him, the accused, to shoot an arrestee of the Sicherheitspolizei in Almelo, as a result of which action by Neubacher and Holbeck the arrestee in question, H.J. Beverdam, lost his life;

on 8 March 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands on 10 May 1940 but before 15 May 1945, ~~in Almelo as Hauptsturmführer~~ at the place called "Woeste Hoeve", as Hauptsturmführer in the service of the German enemy intentionally contrary to the laws and customs of war took measures for the shooting of 117 Netherlanders, which took place as a so-called reprisal

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against the attack on H.A. Rauter, and among other things gave the victims over to the commandant of the execution squad and told the victims that they were going to be shot as a reprisal for an attack on a high-ranking German soldier; as a result of which way of acting on the accused's part 117 Netherlanders lost their lives near the "Woeste Hoeve" through shooting;

on or about 10 April 1945, during and in connection with the war of aggression begun by Germany against the Kingdom of the Netherlands but before 15 May 1945, in Apeldoorn, as Hauptsturmführer and Kommandoführer of the Einsatzkommando Apeldoorn of the Sicherheitspolizei intentionally contrary to the laws and customs of war charged his subordinate R.G.T. Ohmstedt to see to the shooting of a number of prisoners, as a result of which action by the said Ohmstedt 12 prisoners lost their lives in the "Lager Mia" through shooting;

he, the accused, having committed the said actions while he knew that the persons to be shot had not been sentenced to death by any judicial pronouncement and that a reprisal measure allowed by international law was not concerned here;

CONSIDERING nevertheless with relation to that charged under III, that the Court explains the words "as a result of which way of acting" as follows: that by these it is not meant that the accused was the person solely or mainly responsible, but what is intended by them is, that the result in question /came about as a joint consequence of his way of acting;

CONSIDERING that the Court does not deem proved that which was more or otherwise charged under I, III(b) and(c), and IV than is declared above to be proved;

CONSIDERING that what has thus been proved constitutes the crime of:

During the time of the present war before 15 May 1945 in the state service of the enemy being guilty of any war crime as expressed in art.6 under (b) of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946 (Stat. bk. G 5), committed more than once; provided for and made punishable by art.57, Penal Code, and arts.11 and 27a, Extraordinary Penal Law Decree;

which crime contains at the same time the elements of, at any-rate shows the most ressemblance to the crimes:

under I: During the time of the present war but before 15 May 1945, intentionally by misuse of authority together and in conjunction with another inciting to the crime of murder, whereby the offender made use of the power offered him by the enemy;

under III(b) and (c): During the time of the present war but before 15 May 1945, intentionally helping to commit the crime of murder, whereby the offender made use of the power offered him by the enemy, committed more than once;

under IV: During the time of the present war but before 15 May 1945, intentionally by misuse of authority inciting to the crime of murder, whereby the offender made use of the power offered him by the enemy, committed more than once;

CONSIDERING that the accused is therefore punishable, no circumstance having appeared which would remove or exclude his penal liability;

CONSIDERING that the accused has in the first place pleaded that art.27a, Extraordinary Penal Law, is not binding because it goes against the nulla poena principle and by so-doing ~~is~~ runs

counter to one of the elementary principles of the criminal law, to the Declaration of Moscow of 1-11-1943 and also to the "Declaration of Human Rights" of 10 December 1948 made by the United Nations;

CONSIDERING that the Court rejects this plea because the said principle, for so far as it demands a previously laid down penal liability and a threat of punishment, is in no way an absolute principle of law that can never be traversed by other principles, while the Declaration of Moscow in no single respect refers to this principle and while the Declaration of the United Nations, leaving aside that there is no talk of this being an international law convention, does not, as appears from the history of its coming about, desire in any way to prejudice the trial of war criminals;

CONSIDERING therefore that the thesis is incorrect that the nulla poena principle is one from which, according to international law as this holds good, it would never be possible to deviate;

CONSIDERING that the accused has next pleaded that the actions declared proved were permitted as reprisal measures by international law;

CONSIDERING that this plea must already be rejected for the reason that, leaving on one side what remaining conditions must be fulfilled for the admissibility of reprisals, in any case it is not permissible to kill civilians who, as in the present case, are absolutely innocent of the act of sabotage, or of alleged sabotage, in the matter of which the reprisals are taken;

CONSIDERING that the Court will immediately add here that, since it can be very certainly be imagined that there is a certain amount of uncertainty in international law regarding this point, it is the opinion of the Court that for the question as to whether the intention of acting contrary to international law is present in the accused's case the opinion most favourable to the latter must be followed;

CONSIDERING that the accused has next pleaded that the actions declared proved were permissible because the occupier must resort to such acts against acts of sabotage and terrorism and out of self-preservation;

CONSIDERING that this plea must be rejected because the combating of resistance by the occupier is bound under international law by rules, which rules cannot be set aside out of considerations of self-preservation;

CONSIDERING that the accused has further pleaded that he acted by order of his superiors, that not to have followed up orders given by a higher authority would have cost him his life, that a refusal on his part would also have exposed the members of his family to reprisal measures;

CONSIDERING that, for so far as this is an appeal to a state of distress which would justify the act, the Special Court rejects this plea for the reason that a special duty in law was imposed by international law on the accused, who acted as the organ of the occupier, to protect the lives of the civilian population of occupied territory and he was not allowed to attack these civilians directly in their lives in order to assure the safety of his

own life and the interests of his relatives, leaving aside the further fact that the accused has failed to make admissible the factual correctness of the plea;

CONSIDERING that, for so far as the accused by this makes an appeal to duress the Court rejects this appeal, since it has not appeared that he was compelled to his actions purely by duress, whereby the Court however has an open eye to the difficult position in which the accused found himself as a subordinate in the German system, that the Court will express this in the punishment to be imposed on the accused;

CONSIDERING that the accused has objected that the intention of acting contrary to international law was lacking as far as he was concerned, because he could in all good faith think that the orders given were lawful and that it could not be demanded of him as a subordinate that he should test orders given as to their lawfulness;

CONSIDERING that the accused's intention of acting contrary to international law is already sufficiently proved by what was considered about the evidence regarding this;

CONSIDERING that the Court hereby takes it as self-evident that it can only be required of a subordinate that he should not unquestioningly follow given orders if from their contents serious doubts as to their lawfulness must arise in the subordinate's mind;

CONSIDERING however that in the cases declared proved the orders were of such a nature that they must necessarily have raised a doubt in the accused's mind as to their lawfulness;
that, moreover, if it concerns orders from an authority which does not recoil from repeatedly violating international law, which was certainly the case with the head administration of the German Sicherheitspolizei (which must necessarily have been known to the accused who had already worked for some months with the SIPO), severer standards must be laid down for accepting such good faith than would be the case for orders from an authority which in general keeps to the rules of international law;

CONSIDERING finally that this plea of the accused, that he was of good faith, is contrary to his own statement that in the cases under III and IV he tried to get away from these orders, as well as to his own statement that in the "Woeste Hoeve" case he requested Dr. Schöngarth to postpone the reprisals seeing that only such a short time had passed between the reprisals and the attack which had been made;

CONSIDERING that the accused next pleads that he cannot be reproached with Germany's having begun the war contrary to international law, and also that he cannot have known that Germany did begin the war contrary to international law;

CONSIDERING that the Court rejects this plea since the accused is only reproached with having broken rules by which he was bound, without considering whether the war had or had not been begun contrary to international law;

CONSIDERING that the accused has further pleaded that he cannot be tried according to the rules of the London Agreement

and those of the Extraordinary Penal Law Decree, of the existence of which he did not know at the time of the act, but the Court rejects this plea because knowledge of penal provisions is not in any way required for intent in the sense of the criminal law;

CONSIDERING that, with regard to that under III which has been declared proved, the accused has specially pleaded in addition that reprisals permitted by international law were concerned here and that there was no disproportion in this case since it concerned an attack on his supreme chief;

CONSIDERING that the Court also rejects this appeal to good faith, since anyone of accused's education and position must necessarily have understood that in the matter of an attack on one person, whoever he might be, the execution of 117 victims who were themselves guiltless of the attack surpasses all measure; leaving alone that, too, the investigation here as to the author was only in the beginning stage and for this reason the accused himself, so he says, asked for the execution to be postponed;

CONSIDERING that the accused, with relation to that under IV declared proved, has finally pleaded that these acts were justified because he had repeatedly issued a warning to the resistance movement that sharp reprisals would follow new acts of sabotage;

CONSIDERING that the Court rejects this plea, because a previous warning on the part of the occupier cannot put aside rules of international law;

CONSIDERING as to the punishment to be imposed on the accused;

CONSIDERING that very serious breaches of duty in international law and serious measures of terrorism are concerned here, which were the cause, or joint cause, that a great number of persons lost their lives, while as Kommandant of an Einsatzkommando the accused bore a great responsibility;

CONSIDERING that on the other hand the Court is convinced that the accused was never heart and soul behind those measures, that he repeatedly made attempts to escape from carrying out those orders or to have them postponed, and that on one occasion he prevented more serious measures, whereby the Court will at the same time take into consideration the difficult position in which the accused found himself as a subordinate in a German system;

CONSIDERING that on the grounds stated the punishment to be announced further on is in agreement with the nature of the acts committed and the circumstances under which they were committed as these have appeared at the sitting;

CONSIDERING that at the sitting the Court has obtained the impression that the accused is in a state to work;

In view further of arts.27, 47, 48, 49 and 289, Penal Code and 1, 2, 3, 7, 7b, and 28, Extraordinary Penal Law Decree;

ADMINISTERING THE LAW:

Declares the accused guilty of the crime qualified and declared above proved and on that account punishable;

Sentences the accused in the matter to TEN YEARS imprisonment, this punishment to be wholly served in a State Labour Colony;

Decrees that the time spent in custody by the convicted person since 5 May 1945 be fully deducted when the prison sentence imposed is being served;

Declares not proved anything more or otherwise charged against the accused than as has been declared proved above.

Acquits him thereof.

Judgment passed by;

Dr. J.A.G. Baron de Vos van Steenwijk	President
Prof. Dr, D. van Eck	Judge
Major H.J. Strootman	Military Judge

in the presence of:

Dr. H.H. Kirchheiner	Clerk of the Court

and pronounced at the open sitting of the said Special Court, 1 July 1949.

Sgd. De Vos van Steenwijk, D, van Eck, Strootman,
H.H. Kirchheiner.

N.B. The relevant paragraphs of art.49, Penal Code, read:

"The maximum of the major penalties laid down for the crime shall be diminished by a third for complicity.

.....

.....

In deciding the penalty only those actions come into consideration which the accomplice intentionally made easy or promoted, as well as their results."

For arts. 27, Penal Code & 7. 76. Extraordinary Penal Law Decree, see note, appeal case of L.G. BECK.

NETHERLANDS REPRESENTATIVE
ON THE UNITED NATIONS WAR CRIMES
COMMISSION

Room 311, Lansdowne House,
Berkeley Square, London, W.1.
Telephone: Grosvenor 4060 ext. 3064

Carel van Bijlandtlaan 1,
DEN HAAG.

Ref.XXIIa/155.

27 May 1949.

Dear Dr. Litawski,

I am so sorry not to have sent you any more translations of judgments this month as I had hoped. I have one waiting but was asked to hold it over as the man in question is appealing and the Bijzondere Raad van Cassatie (Special Court of Cassation) may have something interesting to say. I shall have the final result I hope on my return from my holiday and will then send the two together, also anything else which I shall then find of interest. By that time some further Cassation judgments will have been delivered, most of the "interesting" accused or the Chief Prosecutors having appealed.

Yours sincerely,

J. Sweeny.

(J. Sweeny,
secretary to Commander Mouton)

Dr. J.J. Litawski,
Consultant on War Crime Trials,
Division of Human Rights,
Russell Square House,
Russell Square,
LONDON, W.C.1.

Tel: TERminus 3081.

Russell Square House,
Russell Square,
London, W.C.1.

6th May, 1949.

Dear Miss Sweeny,

Thank you very much for your letter of the 21st April and for the attached document concerning the Rauter case.

Regarding the penal provisions, your previous translations are available here, and it will therefore only be necessary for you to provide any other Dutch provisions which have not yet been supplied by you. We shall be very grateful to receive these.

Yours sincerely,

J.J.Litawski,
Consultant on War Crime Trials,
Division of Human Rights.

Miss J.E.Sweeny,
Carel van Bijlandtlaan 1,
Den Haag,
Holland.

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Telephone: Grosvenor 4060 ext. 3064

Carel van Bijlandtlaan 1
DEN HAAG.

Ref.XXIIa/153.

21 April 1949.

Dear Dr. Litawski,

Before Commander Mouton went to Geneva he asked me, in connection with a letter he had received from you, to look out for and translate any judgments of Netherlands Courts on German war criminals which seem to be of interest and to send you my translations. You will then receive such from time to time as I can fit them in between work I am doing for the Ministry of Justice, and to begin with here are

1. a request by RAUTER's counsel for a revision of the case;

2. the Special Court of Cassation's reply rejecting this;

3. the Netherlands provisions of law referred to.

The original judgment on RAUTER and the Special Court of Cassation's judgment on his appeal were sent to Mr. Brand and will certainly have been reported on in the UNWCC "Law Reports of Trials of War Criminals", appearing in one or more of the volumes XIII, XIV and XV.

I wonder whether it would be possible for you to get a set of the copies of Penal Provisions I have supplied Mr. Brand with. This would save me work (I am my own typist for everything) for I would then only have to translate any new provision, that is one not already supplied. If however it is too late and the office in Lansdowne House closed, I will of course enclose the relevant provisions with each judgment.

I shall be away for June but will try to send you something further before then.

Yours sincerely,

Joyce E. Sweeny,
Secretary.

Dr. J. Litawski,
U.N. Offices,
Russell Square House,
Russell Square,
LONDON, W.C.

To the Special Court
of Cassation,
's-Gravenhage.

Hans Albin RAUTER, here represented by his counsel Dr. K.van Rijckevorsel, respectfully makes known:

that he requests a revision of the judgment pronounced against him by the Court on 12 January 1949, basing this request on the ground of the circumstance that the General Assembly of the United Nations - object of the San Francisco Charter of 1945 (Statute Book No F253 and F321) - which Assembly was held in Paris on 10 December 1948, drew up, accepted and proclaimed the "Universal Declaration of Human Rights";

that at its sitting on 20 October 1948 this circumstance did not appear to the Court, giving its own judgment in conformity with art.105 of the Judicial Organisation Law, and this circumstance does not seem compatible with the judgment, in this sense that there exists a strong suspicion that had this circumstance been known the investigation of the case would have led to less severe penal provisions being declared applicable;

that the aforementioned circumstance appears from the "United Nations Bulletin" of 1 January 1949;

that had it known of the fact that on 10 December 1948 the United Nations, the Netherlands among them, gave substance to the concepts "lois de l'humanité" and "exigences de la conscience publique" employed in the Hague Convention of 1907, the Court would have applied the said Convention when passing judgment and consequently with regard to the applicant would have observed the Netherlands' duty in international law that "les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique";

that further had it known of the aforesaid fact the Court in its judgment would have applied the San Francisco Charter of 1945 and consequently would have taken into consideration with regard to the applicant the Netherlands' duty in international law, "in promoting and encouraging respect for human rights (arts.1, 55 and 56 of the Charter);

that according to arts.2, 7 and 30 of the "Universal Declaration of Human Rights" the said human rights belong to

every individual,so that since 10 December 1948 applicant not only comes under the protection of the Hague Convention of 1907 but also under that of the San Francisco Charter of 1945;

that as a result of the extraordinary new fact that on 10 December 1948 the United Nations proclaimed human rights, substance is not only given to the Hague Convention of 1907 but also to the San Francisco Charter of 1945, before the contents of which conventions a Netherlands statutory provision which conflicts with the same must give way, at anyrate the application of such a provision must be left aside;

that even should this however not be the case the Court will not surely wish to have pronounced a judgment whereby penal provisions contrary to those human rights unanimously laid down, accepted and proclaimed by all civilised nations in the world, therefore contrary to principles of humanity and justice, are applied, for which reason in conformity with Netherlands law applicant appeals to the extraordinary remedy in law of a revision in order that he may yet be able to avail himself of the said extraordinary new fact;

that in art.27a, B.B.S. (Besluit Buitengewone Strafrecht i.e. Extraordinary Penal Law Decree) is the rule, the prohibition of the commission of war crimes and crimes against humanity, which prohibition according to the Court existed before 1940, not only for States but also for persons who, like the applicant, committed violations of the Hague Convention of 1907 by order of or pursuant to regulations by their Government or their superiors;

that this rule is the same as that already long existing in art.91 of the Military Penal Law for an infraction of which a maximum of three years' imprisonment is laid down;

that art.91, Military Penal Law, not only holds good for men of the Netherlands forces but also, as appears from the words "he who", in connection with art.66, Military Penal Law, for "every person subject to military jurisdiction";

that therefore art.91, Military Penal Law, also holds good for Germans or persons in the German service who were guilty in the Netherlands of the war crimes and crimes against humanity forbidden in the Hague Convention of 1907, seeing that according to art.78 of the Introducing Act of the Military Penal and Disciplinary Law, in connection with art.4, Military Penal Law,

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and art.2 of the Penal Law, the military judge has jurisdiction regarding all the crimes specified in the Military Penal Code which are committed in a part of that territory of the Realm declared to be in a state of ~~emergency~~ siege, it being unnecessary to demonstrate further that the state of ~~emergency~~ siege proclaimed by Royal Decree of 19 April 1940 (Statute Book 183) remained in being during the occupation which might at any time partially or entirely come to an end;

that however as a result of the introduction of art.27a, B.B.S., into the Law of 10 July 1947 (Statute Book H 233) the Special Courts and Special Court of Cassation are again implicitly, even if quite superfluously, accorded jurisdiction over persons having been in the German service;

that art.91, Military Penal Law, has however remained applicable to persons having been in the German service who in this country are declared guilty of war crimes and crimes against humanity, because according to art.1, under 1°, B.B.S., the provisions of that decree are applicable to art.91, Military Penal Law, while, according to art.2, B.B.S., in connection with the aforementioned art.66, Military Penal Law, art.91, Military Penal Law, holds good for all persons subject to the jurisdiction of the Special Courts and Special Court of Cassation;

that a distinction must be made between the aforesaid (superfluous) granting of jurisdiction, the aforesaid (superfluous) rule and the sanction or rather penal provision;

that the fact of the proclamation of human rights only allows the applicant to come back to the application of the sanction or penal provision of that rule laid down in art.27a, B.B.S;

that then in the first place the applicant appeals to art.7 of the "Universal Declaration of Human Rights", reading:

ALL ARE EQUAL BEFORE THE LAW AND ARE ENTITLED WITHOUT ANY DISCRIMINATION TO EQUAL PROTECTION OF THE LAW. ALL ARE ENTITLED TO EQUAL PROTECTION AGAINST ANY DISCRIMINATION IN VIOLATION OF THIS DECLARATION AND AGAINST ANY INCITEMENT TO SUCH DISCRIMINATION.

that it is self-evident that the penal provision (sanction) appearing in par.2 of art.27a, B.B.S., which was laid down for a violation of the rules of the said art.27a, B.B.S., a good two years after hostilities had ended, is flagrantly contrary to the aforementioned human right belonging to each one, to the applicant also therefore, for it is exclusively persons having been in the German service who are affected by that

penal provision, while all other persons coming under the jurisdiction of the Special Jurisdiction (Bijzondere Rechtspleging) may only be punished for the same war crimes and crimes against humanity as those of which applicant is declared guilty in the disputed sentence, by a maximum imprisonment of three years;

that therefore had it known of the fact of the aforementioned human right the Court, on the ground of the duties in international law laid upon the Netherlands by the Hague Convention of 1907 and the San Francisco Charter of 1945 to respect human rights, would not have applied the penal provision of art.27a, par.2, B.B.S., as being one-sidedly directed against persons having been in the German service;

that to a very important extent the Court has deviated in favour of the applicant from the judgment passed on him by the Special Court in 's-Gravenhage, through the Court having decided that the applicant's actions appearing under I,II,V,VI and VII, which were declared to have been proved, do not contain the elements of the crimes of arts.278, 282 and 289 of the Penal Law, so that it is now established by judgment entered that the applicant's actions declared to have been proved do not have to be specified, as had been decided by the lower Court, as murder, manslaughter, kidnapping and deprivation of liberty but exclusively as violations of the laws and customs of war;

that in spite of this the Court (of Cassation), in conformity with art.27a, B.B.S., par.2, has declared applicable to the applicant the punishments laid down for the crimes he did not commit, namely murder, kidnapping and deprivation of liberty, the punishments being moreover increased by art.11, B.B.S.;

that therefore had it known of the proclamation of the above-mentioned human right the Court would not have gone on to apply penal provisions by analogy, directed exclusively and one-sidedly against persons in the German service, since all other persons coming under the jurisdiction of the Special Jurisdiction who have committed war crimes or crimes against humanity, in any way or to any extent, may not be punished with more than three years' imprisonment if it has been entered, as in the appellant's case, that there is no conjunction with the crimes of arts.278, 282 and 289 of the Penal Law;

that therefore this application of penal provisions by analogy, directed exclusively and one-sidedly against persons having been in the German service, is also a discrimination forbidden by international law, at anyrate by principles of humanity and justice

of persons having been in the German service;

that in the second place the applicant appeals to the second sentence of art.11, par.2, of the "Universal Declaration of Human Rights", reading:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. NOR SHALL A HEAVIER PENALTY BE IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME THE PENAL OFFENCE WAS COMMITTED".

that had it known of the fact of the proclamation of this human right the Court would have examined which penalty was applicable to the applicant during that time when the crimes concerned were committed;

that had the applicant come into the power of the Netherlands before the termination of hostilities art.91, Military Penal Law in connection with art.66of the same law and art.78, Introducing Act of the Military Penal and Disciplinary Law, would have been applicable to him as has already been explained above;

that however the Court may also have been of the opinion that before the termination of hostilities German law was applicable to the applicant, irrespective of whether he came into the power of the Netherlands before or after the termination of hostilities;

that according to German law it is possible to punish the perpetrators of war crimes and crimes against humanity, and this took place by order of the victorious Allies after the termination of the first world war;

that however this punishment did not take place by virtue of independant penal provisions already existing in German law and laid down for a violation of the laws and customs of war, such as art.91, Military Penal Law, but by virtue of the ordinary penal provisions, it being then allowed to invoke the rules of war as a justification for a transgression of the penal provisions in question;

that therefore in accordance with German law the applicant can only be punished should the actions declared proved contain the elements of acts punishable according to German law, but this is not the case here any more than it is according to Netherlands law, apart from that under III and IV declared proved and which is unimportant;

that should it be the opinion of the Court, respecting the

human right last mentioned, that German law was applicable at the time that ~~that~~ which has been declared proved was committed, ~~it~~ it will certainly not declare applicable that application by analogy/which was introduced into German law in 1935 and disapproved of at the time by nearly the whole of the Netherlands, for this "application by analogy" does not "answer to the minimum demands which must be made of a civilised nation in this connection";

/ of the penal law

that the Court will not/do this seeing that with Decree 62/123 the occupying power introduced such an application of the penal law by analogy into the Netherlands, which occupation measure by its being placed on the "A" list of the"Occupation Measures Decree" has been obliterated from Netherlands legislation; all the more

that therefore had it known of the fact of the proclamation of the last mentioned human right the Court would either, applying Netherlands law, have imposed a sentence of at the most three years or, applying German law, not have imposed any sentence at all or only a very light one;

that as appears from the disputed sentence the Court even devotes considerations - be they then, alas, incorrect ones - to the question as to whether certain formalities were or were not observed in the conduct of the case and even instituted an enquiry into the same, so that it may be expected with certainty that the Court will refer the case back to the sitting of the Court for a fresh examination now that it is not a question here of formalities but of whether, by applying the penal provision contained in art.27a, par.2, B.B.S., the aforesaid principles of justice accepted by the entire civilised world have or have not been respected.

That it may therefore please the Court to consider this request for a revision to be founded and to order the suspension of the execution of the judgment entered, referring the case back to the sitting of the Court.

Doing which, etc.

's-Gravenhage, 14 February 1949. barrister.

The Special Court of Cassation, First Panel.

In answer to the request submitted by Dr. K. van Rijckvorsel, barrister, 's-Gravenhage, in the name of Hans Albin RAUTER, for a revision of a judgment pronounced by the Court on 12 January 1949, whereby, with a correction of the qualification, the appeal brought against a judgment of the Special Court in 's-Gravenhage on 4 May 1948 was rejected, in which judgment RAUTER was sentenced in the matter of acts qualified by the Special Court of Cassation as the continued crimes of:

> the during the time of the present war in the forces or Government service of the enemy being guilty of war crimes and crimes against humanity, as expressed in art.6, under b and c, of the Charter belonging to the London Agreement of 8 August 1945, promulgated by Royal Decree of 4 January 1946, Statute Book No G5;

Having heard the Assistant Prosecutor, speaking for the Chief Prosecutor, in his conclusion to the effect that the request be declared non-admissible;

Considering that the request, certain unseemly passages omitted, states in substance as a new circumstance, as expressed in art.457, par.1 under 2°, Code of Penal Procedure, the drawing up, accepting and proclaiming in Paris on 10 December 1948 by the General Assembly of the United Nations of the "Universal Declaration of Human Rights", which circumstance according to the request was not apparent to the Court (of Cassation) at the investigation at the sitting of 20 October 1948, while had it indeed been so the investigation would have led to the application of less severe penal provisions, and this for the reason that the said Declaration "gave substance to the Hague Convention of 1907 and to the San Francisco Charter of 1945" and the United Nations have by this established rules of international law;

Considering therefore that according to the applicant the ground for a revision would consist in an alteration of the objective law applicable here;

Considering that apart from the circumstance that the applicant incorrectly attributes this character to the Declaration

(as clearly appears from the consultations held in Paris on 28 and 29 October 1948 with regard to the draft of the Declaration) the ground advanced cannot lead to a revision;

Considering indeed that for this the law demands a circumstance which could be apparent to the Judge at the sitting, and there can be no talk of this with regard to rules of law for these are not apparent at the sitting but are known to the Judge from elsewhere;

Considering also that there can only be talk of a revision, as expressed in art.457, par.1 under 2°, on the ground of facts not known at the sitting but in reality existing through which a new light is thrown on the whole or on a part of the actual events on the ground of which a judgment took place, but never on the ground of a wrong application of the law or of an alteration in the rules of law applicable;

Declares the request non-admissible.

Judgment passed in the Council Chamber of the Court on 19 March 1949 by:

Dr. Haga.	President
Prof.Dr.Verzijl	Judges
Prof.Dr.van Brakel	
Prof.Pompe	
Lt.Gen.Best	Military Judge

in the presence of:

Dr.van Oordt	Clerk of the Court.

sgd. Haga, J.H.W.Verzijl, S.van Brakel, W.Pompe, P.W.Best, H.v.Oordt.

(D 61) EXTRAORDINARY PENAL LAW DECREE.

Art.1. The provisions of this decree are applicable to the crimes committed during the present war before 15 May 1945, which are specified in

1°. one of the Parts I and II of the Second Book or one of the articles 137a, 137b, 205 of the Penal Code, one of the Parts I and II of the Second Book or article 150 of the Military Penal Code, or one of the articles 26, 27 and 27a of this decree;

Art.2. Unless otherwise laid down in this decree the provisions of the Military Penal Code and those for the execution of the same, as well as the provisions of the common criminal law, subject to the deviations laid down in the above Code, are applicable with respect to the crimes expressed in the preceding article, on the understanding that where in the Military Penal Code the Military Judge or military competence are spoken of the judge appointed by the Decree on the Special Courts and his competence are also respectively understood.

Art.11. (1) He who is guilty of a crime to which the provisions of this decree apply may be sentenced:

1°. to the death penalty, imprisonment for life or temporary imprisonment for at the most twenty years, if a penalty of fifteen years imprisonment has been laid down in the Penal Code for that crime;

2°. to imprisonment for life or temporary imprisonment for at the most twenty years, if a penalty of less than fifteen years but more than seven years and six months imprisonment has been laid down in the Penal Code for that crime;

3°. to double the penalty if a penalty of not more than seven years and six months but more than two years and six months imprisonment has been laid down in the Penal Code for that crime;

4°. to imprisonment for at the most five years if a penalty of two years and six months or less or detention has been laid down in the Penal Code for that crime;

5°. if for that crime a fine is laid down in the Penal Code, to ten times the amount of the fine laid down there for it;

all without prejudice to the possibility of inflicting a heavier punishment which might be laid down in the Military Penal Code for the crime.

(2) That laid down in article 45 of the Penal Code is not applicable.

(3) In addition to or in place of other penalties the judge may impose a fine, the maximum being f.100.000. If the judge decides that the offender by a misuse of the special circumstances has enriched himself, this sum may be increased to treble the amount by which the offender has enriched himself as estimated by the judge.

Art. 27a. (1) He who during the time of the present war and while in the forces or service of the enemy state is guilty of a war crime or any crime against humanity as defined in article 6 under (b) or (c) of the Charter of the London Agreement of 8th August 1945 promulgated in our Decree of 4th January 1946 (Statute Book No, G 5) shall, if such crime contains at the same time the elements of a punishable act according to Netherlands law, receive the punishment laid down for such act.

(2) If such crime does not at the same time contain the elements of a punishable act according to Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity.

(3) Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2.

NETHERLANDS PENAL CODE.

Art.2. The Netherlands Penal Code is applicable to anyone who is guilty of a punishable act within the Realm in Europe.

Art.278. He who conveys someone over the frontiers of the Realm in Europe with the intention of illegally getting him into the power of another or of placing him in a helpless situation shall, as guilty of kidnapping, be punished with imprisonment of at the most twelve years.

Art.282. He who intentionally deprives a person unlawfully of his liberty or holds him deprived of same, shall be punished with imprisonment of at the most seven years and six months.

If the act results in severe bodily injury the guilty party shall be punished with imprisonment of at the most nine years.

If the act results in death he shall be punished with imprisonment of at the most twelve years.

The penalties laid down in this article are also applicable to him who intentionally provides a place for the unlawful deprivation of liberty.

Art.289. He who intentionally and with premeditation takes the life of another shall, as guilty of murder, be punished with imprisonment for life or temporary imprisonment for at the most twenty years.

CODE OF PENAL PROCEDURE. (see page 3)

CODE OF PENAL PROCEDURE.

Art.457. Revision of a final judgment entered containing a sentence can be requested:
1°. .....
2°. on the ground of any circumstance which was not apparent to the judge during the investigation at the sitting and which in itself or in connection with the earlier evidence produced does not seem compatible with the judgment, in this sense, that serious suspicion arises that had it been known the investigation of the case would have led either to an acquittal of the sentenced person, or to a discharge of the same from prosecution on the ground that he was not punishable, or to a declaration of the non-admissibility of the Public Prosecutor, or to a less severe penal provision being declared applicable.

JUDICIAL ORGANISATION LAW.

Art.105. If the judgment or sentence is quashed in the case of a misapplication or violation of the law, or when competence has been exceeded, the Supreme Court, without being allowed to investigate further whether the facts appearing in the disputed judgment or sentence did or did not exist, shall proceed to give its own judgment, This judgment on the lower court's sentence is then final.

MILITARY PENAL CODE.

Art.4. The Netherlands penal law, except in the cases specified in the Penal Code, is applicable to the military man:
1°. who while serving outside the Realm in Europe is guilty of any punishable act;
2°. who while not serving is outside the Realm in Europe and there is guilty of one of the crimes specified in this Code, or of any misfeasance in connection with his relations with the army or navy, of any such misfeasance, or of any punishable act committed under one of the circumstances stated in art.44 of the Penal Code.

Art.66. In the expression "he who...", employed in the specification of a crime, the word "he" is understood to mean any person subject to military jurisdiction.

Art.91. He who with respect to the enemy intentionally acts contrary

to any provision appearing in a treaty holding good between the Netherlands and the power with whom the Netherlands is at war, or to any regulation drawn up as a result of such treaty, shall be punished with at most three years imprisonment.

The superior who intentionally allows one of his subordinates to commit such an act shall receive the same punishment.

INTRODUCING LAW OF THE MILITARY PENAL AND DISCIPLINARY LAW.

Art.78. Furthermore the military judge, in so far as not already competent in virtue of one of the two preceding articles, shall take judicial notice:

1°. of crimes committed in the event of war by any person whatsoever in a part of the territory of the Realm declared to be in a state of siege, for so far as those crimes are specified in Parts I or II of the Second Book of the Penal Code or in the Military Penal Code;

2°. in the event of war, of punishable acts committed in a part of the territory of the Realm declared to be in a state of siege, if the civil judge, who according to the law should in the first instance have passed judgment, is not in a position to take judicial notice thereof;

3°. of punishable acts committed by any person whatsoever in enemy territory partially or wholly occupied by the Netherlands forces, if any Netherlands interest has been or can be harmed thereby, unless the act has been made non-punishable by the Military Penal and the war is at an end.
